

OREGON NATURAL RESOURCES COUNCIL

IBLA 88-612

Decided July 3, 1990

Appeal from a decision of the Clackamas Resource Area Office, Bureau of Land Management, denying a protest to a timber sale and awarding the sale contract. OR-080-TS8-028

Affirmed.

1. Timber Sales and Disposals

A BLM decision denying a protest of a proposed timber sale will not be disturbed on appeal where appellant fails to establish that BLM did not adequately consider matters of environmental concern, such as the threat of soil erosion posed by road building and the cumulative impacts of continued timber harvesting, and appellant has failed to meet its burden of showing error in the BLM decision.

APPEARANCES: Wendell Wood, Educational Programs Coordinator, Oregon Natural Resources Council, for appellant; Richard A. Whitley, Area Manager, Clackamas Resource Area Office, Salem, Oregon, for the Bureau of Land Management; Michael E. Haglund, Esq., Portland, Oregon, for Frank Lumber Company.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Oregon Natural Resources Council (ONRC) has appealed from a decision of the Acting Area Manager, Clackamas Resource Area, Oregon, Bureau of Land Management (BLM), dated June 30, 1988, denying its pro-test of the proposed Cougar Tooth Timber Sale (OR-080-TS8-028). This sale would involve the removal of 3.923 million merchantable board feet (MBF) of timber from 88 acres of land, designated as unit Nos. 1 through 3 of tract No. 88-5, situated in secs. 9 and 10, T. 6 S., R. 4 E., Willamette Meridian, Clackamas County, Oregon, within the Lukens Creek drainage, by means of clearcutting and the construction of suitable access roads.

The Acting Area Manager's June 1988 decision delayed awarding the timber sale contract to Frank Lumber Company (Frank), the high bidder at the timber sale held March 30, 1988, pursuant to 43 CFR 5003.3(f), until 30 days following ONRC's receipt of the decision, in order to allow ONRC to petition the Board for a stay of implementation of the decision.

ONRC requested a stay of implementation of the sale pending full review by this Board with the filing of its statement of reasons (SOR) for appeal on July 14, 1988. BLM filed a response with the Board September 6, 1988, urging that the request for stay be denied. In addition, BLM delayed awarding the timber sale contract to Frank for 30 days following the Board's receipt of BLM's answer. Frank also entered an appearance, opposing ONRC's request for a stay.

In considering the stay request, the Board reviewed the entire record, including ONRC's SOR, BLM's answer, and Frank's submissions. We considered the various arguments raised by ONRC and concluded that ONRC had not demonstrated an adequate basis for granting a stay of the proposed timber sale. We found that ONRC had not shown a substantial likelihood of success on the merits of any of its claims. Further, we found that BLM had adequately considered all of the factors identified by ONRC, particularly the threat of soil erosion posed by timber harvesting and road building activity, and that the environmental assessment (EA) was not deficient. In addition, we concluded from our review that ONRC had failed to demonstrate that proceeding with the timber sale would cause "a substantial threat of irreparable injury" to the natural resource values of the area of the timber sale and, thus, to the ONRC members' use and enjoyment of the area. Therefore, by order dated October 6, 1988, the Board denied the request for stay. No further pleadings or submissions were filed by the parties subsequent to this order.

A brief chronology of the pertinent facts of this case is set forth in the Board's October 6 order as follows:

In order to assess the environmental impact of the proposed timber sale and thereby properly decide whether to proceed with the sale, BLM initially prepared an environmental assessment (EA) in January 1987, which assessment was tiered to the May 1983 Eastside Salem Sustained Yield Units Ten-Year Timber Management Plan Final Environmental Impact Statement (FEIS). As initially proposed, the timber sale would have involved the clearcutting of 102 acres of land. In a February 8, 1988, decision, the Area Manager, relying on the EA and the FEIS, decided to proceed with the timber sale as proposed with an additional 9 acres of land intended for clearcutting, concluding that it did not constitute a major Federal action which would significantly affect the quality of the human environment thereby requiring preparation of an EIS. On February 23, 1988, ONRC filed a protest to the proposed timber sale, raising almost all of the concerns now identified in its SOR. In response to the protest, BLM revised its proposed timber sale, deleting 23 acres of land previously intended for clearcutting. BLM subsequently prepared a substantially revised EA on April 12, 1988, which assessed the environmental impact of the timber sale as then proposed, a deferred harvest alternative and other modified harvest alternatives. In an April 15, 1988, decision, the Acting Area Manager, relying on the revised EA and the FEIS, decided to proceed with the timber sale as then proposed, concluding that no EIS was necessary. On May 20, 1988, ONRC filed a protest of the proposed timber sale, essentially reiterating the

concerns identified in its original protest. In denying ONRC's protest, the Acting Area Manager addressed all of ONRC's concerns. [Footnote omitted.]

(Order at 2-4).

[1] ONRC contends in its SOR, *inter alia*, that implementation of the BLM decision would harm ONRC members who "use and enjoy Lukens/Rock Canyon Creek area." ONRC complains that it was "inappropriate for BLM to offer this sale for bidding before our concerns were fully addressed." It asserts that by proceeding with the sale, BLM cannot objectively consider the issues (SOR at 1). We specifically addressed this contention in our initial review of the case while considering the request for stay and rejected this analysis. From our further review of the record we have found nothing to alter our initial determination and we reaffirm our conclusion that BLM's review of ONRC's concerns was fair and unbiased. ^{1/}

Appellant challenges BLM's consideration and assessment of the environmental impact of the Cougar Tooth Timber Sale, pointing to alleged deficiencies in the EA. ONRC maintains that soil will erode from the slopes that are currently planned for logging and road building, describing the slopes as "excessively steep" with "numerous rock outcrops" and "very thin and highly erodible soils." ONRC maintains that erosion of these slopes will adversely affect future site productivity, rare plants, and fish bearing streams (SOR at 2).

ONRC contends that BLM inadequately considered this threat in its assessment of the environmental impact of the proposed timber sale, specifically ignoring staff comments and recommendations to that effect (SOR at 3-4). Overall, ONRC asserts that BLM failed to consider management of the sale area for multiple uses, rather than just timber production, and has failed to do an adequate environmental review. However, from our review we must conclude that appellant has not provided sufficient factual information to support these allegations.

^{1/} In our order of Oct. 6, 1988, denying ONRC's request for a stay we addressed the merits of this contention in footnote 1 stating:

"On appeal, ONRC contends that proceeding with the sale before its concerns were fully addressed was 'highly inappropriate' and, at worst, biased BLM's subsequent review in favor of awarding the contract. We disagree with this analysis. Under current regulations, BLM is permitted to offer timber sales for competitive bidding during the pendency of a protest and to 'proceed with implementation of [a forest management] decision, [including advertised timber sales]' following a decision on the protest (43 CFR 5003.3(f)). This comports with the intent of the regulations which is to 'increase the probability that private businesses dependent upon the Bureau of Land Management's timber management contracts [will] be able to accomplish their regularly scheduled activities.' 49 FR 3884 (Jan. 31, 1984). We cannot say that such a process necessarily skews the results of BLM's review in favor of ultimately awarding the contract. Nor has ONRC presented any evidence that BLM's review of the instant timber sale was biased."

In similar circumstances the Board has emphasized the critical burden a party challenging a BLM timber sale must meet to sustain a protest. In In re Crane Prairie Timber Sale, 109 IBLA 188, 195 (1989), the Board reiterated holdings of earlier cases setting forth the necessary criteria, stating:

In In re Upper Floras Timber Sale, [86 IBLA 296 (1985)] at 305, this Board held:

In challenging policies of BLM in managing the Federal lands, [a] party bears the burden of showing error in [BLM's] actions. A mere disagreement or difference of opinion will not suffice in this respect. Robert C. Salisbury, 79 IBLA 370, 379 (1984). More-over, appellant must do more than simply level broad-side charges at BLM; the error alleged must be stated with reasonable particularity and supported by objective proof.

In In re Blackeye Again Timber Sale, [98 IBLA 108 (1987)], this Board stated at page 110:

A determination that a proposed action will not have a significant impact on the quality of the human environment, based on an EA, will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant environmental concerns have been identified, and the final determination is reasonable in light of the environmental analysis. Glacier-Two Medicine Alliance, 88 IBLA 133 (1985). The party challenging the determination must show it was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Id. The burden of proof is on [the challenging] party. Township of Lower Alloways Creek v. Public Service Electric & Gas Co., 687 F.2d 732, 747 (3d Cir. 1982). [Footnotes omitted.]

In its answer, BLM provided an extensive and detailed response to each contention raised by ONRC and described the Bureau's procedures for conducting this sale with an effort to identify and accommodate ONRC's environmental concerns for protection of this area. BLM maintains that it has adequately addressed each of ONRC's concerns during the environmental review process, both in the preparation of the ultimate revised Cougar Tooth EA and the FEIS. BLM notes that special attention was given to issues raised by ONRC in that the protest was granted in part and the sale was substantially modified prior to auction. Additional analysis was included in the revised EA. In addition, after the sale an updated EA was written that reflected changes in the sale and additional analysis (Answer at 2).

The record confirms that BLM was responsive to ONRC's concerns and made an effort to accommodate its views. This is substantiated by modifications of the sale acreage. In response to the protest, BLM revised the sale, deleting 23 acres of land previously intended for clearcutting. All bidders at the sale were notified of the impending protest and that the sale might not be consummated or could be delayed while BLM acted on the ONRC protest. 2/

As to allegations that BLM ignored staff recommendations BLM responded:

Admittedly, some [Interdisciplinary] ID Team member names were inadvertently excluded from the original EA, however their comments are a matter of record. Many different thoughts and ideas were discussed during ID Team meetings. Some were incorporated in the EA and others were not. The revised EA and Decision Record fully consider their comments. Their names were added to the list of ID Team members.

* * * * *

The ID Team determined Bureau guidelines would be met, and most potential impacts would be mitigated by the proposed action. All staff comments were adequately addressed by the ID Team and included in the Revised EA. Proper consideration was given to all staff recommendations.

(Answer at 3, 5).

In further criticism of the EA, ONRC asserts that BLM overlooked reforestation problems and has failed to follow guidelines for spatial distribution of clearcuts (SOR at 3-4).

As to excessive erosion and productivity loss, BLM states these concerns were identified, addressed, and mitigated in the EA. Possible unmitigated impacts are all within Bureau guidelines and disclosed in the EA. BLM denies regeneration problems, stating:

Adjacent 3 to 20 year old BLM clearcuts have been reforested to within BLM stocking standards. There is no reason to believe Cougar's Tooth will have reforestation problems.

The EA and Decision Record as tiered to the Eastside Salem Final Environmental Impact Statement (FEIS), have concluded Cougar's Tooth is in conformance with approved Bureau standards and guidelines.

(Answer at 3).

2/ By letter dated Apr. 6, 1988, the Area Manager informed ONRC that the proposed timber sale had gone ahead as planned on Mar. 30, 1988, but that all bidders were notified that a timber sale contract "may not be awarded," or could be delayed while BLM acted on the protest.

Frank also provided evidence with its submissions, i.e., photographs of previously harvested areas within the vicinity of the proposed timber sale, indicating successful regeneration. Further, Frank submitted an August 3, 1988, letter from its Timber and Land Manager, who stated:

Since 1970, Frank Lumber Co. has purchased approximately 20 Bureau of Land Management timber sales and one State of Oregon timber sale within a six-mile radius of the Cougar Tooth timber sale. These sales included clearcut harvest units on terrain and soils similar to those involved within the Cougar Tooth timber sale and in some instances on steeper slopes.

* * * Without exception, those sales within a six-mile radius of the Cougar Tooth timber sale that we have harvested have been successfully restocked with new stands. I have not observed any excessive erosion or loss of soil productivity.

BLM specifically noted that Bureau guidelines regarding spatial distribution have been followed, stating:

The Salem District's spatial distribution guidelines are to maintain, where possible, the area around a clearcut undisturbed 10 years (Salem District Management Framework Plan (MFP) dated 1983, Exh. 37, WL-9.2). Units 1 and 3 are adjacent to units harvested in 1978, and these harvested units are now stocked with 300 to 400 trees per acre. There is no prior cutting adjacent to Unit 2. The three units are distributed a normal distance apart, and large reserve areas of timber are between the units. There are no recent clearcuts "directly next to" Units 2 or 3.

(Answer at 5).

ONRC maintains that BLM has never fully discussed the total cumulative impacts of the continued timber harvesting on this area and maintains that the necessary information is not found in any of the Bureau's environmental review documents (SOR at 4). In response BLM argues that the sale would have no significant impact on hydrology and wildlife. BLM notes that both items were clearly within the effects analyzed in the FEIS. Also the revised EA defines the analysis area of cumulative effects as to the Lukens Creek drainage and contains figures for both hydrology and wildlife. BLM points out that ONRC has confused the figures from these studies and has not shown that this sale would have a significant impact on the watershed (Answer at 6).

ONRC charges that BLM did not adequately consult with other agencies or with U.S. Fish and Wildlife Service (FWS) as to possible protection of threatened and endangered species (SOR at 7). BLM responded that it had made an effort to provide for the protection of fisheries adopting suggestions of the Oregon Department of Fish and Wildlife in the Revised Cougar Tooth EA so that streams will be cleaned of logging debris, logs will be fully suspended over streams, and directional felling of trees near streams will be required. Also, harvest operations will be restricted to periods

of dry weather to reduce any possible impacts to fisheries on Lukens Creek (Answer at 5).

As to BLM's need to refer this matter to FWS for an evaluation of protection of threatened and endangered species, we affirm our initial rejection of this argument. In our October 6 order we found BLM's action did not violate the law. BLM responds that formal consultation with FWS is only required for species listed as threatened and endangered or candidate species and there were none listed in the sale area on the updated list (Answer at 8). Thus, we adhere to our initial holding, stating:

With respect to threatened and endangered species, ONRC contends that BLM is required by section 7(c) of the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. § 1536(c)(1) (1982), to "inquire" of the U.S. Fish and Wildlife Service (FWS) as to whether any such species are present in an area where Federal action is proposed, and that a failure to do so constitutes a violation of the ESA for which an injunction may be issued, citing Thomas v. Peterson, 753 F.2d 754, 763-65 (9th Cir. 1985) (SOR at 7). Section 7(c)(1) of the ESA indeed requires a Federal agency to request "information whether any species which is listed (as threatened or endangered) or proposed to be listed may be present in the area of * * * proposed action." 16 U.S.C. § 1536(c)(1) (1982). However, the request is to be directed to the "Secretary [of the Interior]." Id. The record indicates that BLM made a determination whether the proposed sale area contains any threatened or endangered species, concluding that it does not. Thus, we discern no violation of section 7(c)(1) of the ESA. See In re Letz Boogie Timber Sale, 102 IBLA 137, 142-43 (1988). We note that 50 CFR 402.12(c), which implements section 7(c)(1) of the ESA, requires that the request for information be directed to the FWS. However, that regulation is specifically applicable only where the proposed action constitutes a major Federal action significantly affecting the quality of the human environment. See 50 CFR 402.02 and 402.12(b). ONRC has not sufficiently refuted BLM's conclusion that the proposed timber sale does not constitute such a major Federal action. Thus, we discern no violation of 50 CFR 402.12(c). Nothing in Thomas, which involved a major Federal action, contradicts this construction of the statute and its implementing regulations.

(Order at 4 n.2).

BLM notes that ONRC's statements regarding policy on productivity are unclear, stating: "The FEIS analyzed soil productivity loss due to timber management activity. Allowable cut calculations were reduced based on previous areas of soil compaction. Cougar's Tooth is well within productivity loss guidelines" (Answer at 6).

ONRC also criticizes the EA asserting it did not consider a full range of alternatives, and that a "no action" alternative was not considered (SOR

at 7-8). BLM asserts that the FEIS used on its timber sale program has considered a broad range of reasonable alternatives and therefore the EA need not contain re-analysis of alternatives already considered to the proposed action. In addition, BLM indicates that site-specific reasonable alternatives were still considered, stating:

The Cougar's Tooth EA considered but eliminated the deferred harvest alternative, aerial logging, long-span skyline logging requiring full suspension, broadcast burning as well as inclusion of some fragile areas within the boundaries of Units 1 and 2 (Exh. 3, at 9 and 11). The resultant proposed action was a product of early involvement by ONRC (reference page 2 of this letter), BLM staff recommendations, input from ODFW [Oregon Department of Fish and Wildlife] and interdisciplinary environmental analysis in the Environmental Assessment.

(Answer at 9).

In addition, a no-action alternative was fully considered in the FEIS in conjunction with an indepth site-specific analysis. BLM points out that the EA is tiered to the FEIS, and there is no requirement to treat the no action alternative a second time in the EA, especially when all the information was transferred from working files to the EA and Decision Record (Answer at 9).

This Board has recently noted that an EA is only required to include a "brief" discussion of "alternatives" as required by section 102(2)(E) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(E) (1982). 40 CFR 1508.9(b). Section 102(2)(E) of NEPA, requires a Federal agency to describe "appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." In re Long Missouri Timber Sale, 106 IBLA 83, 87 (1988). The record includes adequate reference to "appropriate alternatives." Alternatives were discussed in the FEIS to which the EA is tiered. See In re Upper Floras Timber Sale, 86 IBLA 296, 311 (1985). The Board has previously noted that this dual procedure constitutes an adequate consideration of reasonable alternatives to clearcutting. In re Fir Point Return Timber Sale, Order, dated October 26, 1987, at 3; see also In re Blackeye Again Timber Sale, supra at 111-12; In re Upper Floras Timber Sale, supra at 311. Moreover, tiering has been considered acceptable and appropriate so that the cumulative impacts of the entire program need not be reiterated in the EA. In re Letz Boogie Timber Sale, supra.

ONRC has presented nothing with this appeal that would justify overturning this timber sale based on the adequacy of the range of alternatives considered by BLM in its environmental review. See In re Blackeye Again Timber Sale, supra; In re Upper Floras Timber Sale, supra.

ONRC has failed to meet its burden of providing the necessary information or "objective proof" to show that BLM's environmental analysis or decision to proceed with the proposed timber sale was in error. In re Upper Floras Timber Sale, supra. At most, it has provided information

which indicates its own views on the timber harvesting in the area which is tantamount to a mere disagreement or difference of opinion on the direction to be taken in the management of the timber of this area. A mere disagreement or difference of opinion will not suffice to show error. Hoosier Environmental Council, 109 IBLA 160 (1989); In re Crane Prairie Timber Sale, *supra*; In re Trailhead Timber Sale, 97 IBLA 8, 10 (1987). In this instance we find that the record establishes that BLM adequately considered all relevant matters of environmental concern prior to proceeding with the pro-posed sale. Accordingly, we affirm the June 30, 1988, decision by BLM denying ONRC's protest of the Cougar Tooth Timber Sale. To the extent appellants have raised arguments which we have not specifically addressed herein, they have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

John H. Kelly
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge